
IN THE
United States Circuit Court of Appeals
 FOR THE NINTH CIRCUIT

LAU SHEE, also known as LOW
 FOOK YUNG, also known as
 NGONG FON and also known as
 LOW SHEE,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner
 of Immigration of the Port of San
 Francisco, California,

Appellee.

11

BRIEF FOR APPELLANT

EMERY F. MITCHELL,
Attorney for Appellant.

FILED

MAY 13 1927

F. D. MONCKTON,
 CLERK.

No. 5123

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAU SHEE, also known as LOW
FOOK YUNG, also known as
NGONG FON and also known as
LOW SHEE,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner
of Immigration of the Port of San
Francisco, California,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from an order and judgment of the United States District Court for the Northern District of California, sustaining the demurrer which was interposed by the Government to the petition of Lau Shee for discharge on a writ of habeas corpus.

STATEMENT OF THE FACTS

Lau Shee, an alien of the Chinese race, arrived at the Port of Seattle September 1, 1923. She sought admission to the United States as the wife of an American citizen. The alien was detained at Seattle pending an investigation and hearing, and upon a satisfactory termi-

nation of such investigation and hearing the alien was landed on September 29, 1923, as the wife of an American citizen, Jew Shep.

A year later, by virtue of a warrant of arrest dated October 7, 1924, Lau Shee was charged with being in the United States in violation of section 19 of the Immigration Act of February 5, 1917. More particularly, the warrant of arrest sets forth four offenses: (1) that she secured admission to the United States by fraud; (2) that she entered by means of false and misleading statements; (3) that she had been found practicing prostitution since her entry; and (4) that she entered for an immoral purpose.

After the warrant of arrest was issued in the year 1924 nothing further was done toward granting the alien a hearing until the month of October, 1926. This hearing in the year 1926 was afforded at the instance and request of the alien.

The Immigration Department attempted to sustain the four charges set forth in the warrant of arrest by introducing into evidence:

1. A statement taken from the alien on October 7, 1924;
2. A letter signed by R. P. Bonham, District Director of Immigration at Portland, Ore., to the Commissioner of Immigration at San Francisco;
3. The Chinese files showing the entries into the United States and the departures from the United States of the alien, her husband and their child.

The Board of Review found, after an examination of this evidence, that Lau Shee had been in the United States too long to deport her on the charge that she entered the United States by means of false and misleading statements.

The Board of Review further found that there was no evidence in the record supporting the charge that the alien had been found practicing prostitution since her entry into the United States.

A warrant of deportation, however, was issued upon the grounds that Lau Shee entered the United States for an immoral purpose and that she secured admission by fraud, not having been, at the time of her entry, the wife of a member of the exempt classes.

It is the Government's contention that the fraudulent entry is proved by the fact that Lau Shee had entered the United States in 1917 as the wife of Yee Leung, an American citizen.

While the Board of Review states in its opinion that Lau Shee testified in Seattle that she had never been in the United States before, we have been unable to find a statement in the record to this effect. So far as the record shows the alien was not questioned as to whether or not she had ever been in the United States before. It is true that she did not volunteer any information upon the matter, and affirmatively represented that Jew Shep was her first husband. This, however, was embraced in the charge of entry by means of false and misleading statements, which has been dismissed.

ARGUMENT WITH POINTS AND AUTHORITIES

1. THE FINDINGS HEREIN MADE BY THE BOARD OF REVIEW AS THE BASIS FOR THE WARRANT OF DEPORTATION ARE CONTRARY TO LAW.

We are aware of the rule that where there is any evidence to sustain the finding of the departmental board,

such finding is final, and not open to review by any court. It is our contention, however, that there is no evidence in support of such findings. Directing our attention first to the charge that Lau Shee entered the United States for an immoral purpose: the evidence in the various files (particularly Lau Shee's Seattle file 405/1-6) establishes that these parties went through a marriage ceremony in China in accordance with Chinese customs; that Lau Shee believed herself free to marry at the time in question; that they lived in China as man and wife for approximately ten months; that a son, Jew Jin Ah, was born, the lawful issue of said marriage in China; that they came to the United States and entered the United States as man and wife; that they have lived together in the United States as man and wife since 1923.

In the case of *Ex parte Morel*, 292 Fed. 423, 427, the court said:

“Sexual intercourse of the parties must be the motive and purpose of the importation, and where parties enter the United States upon the belief that they had a lawful right to sustain the relation of husband and wife they may not be regarded as within the provisions denounced by the Immigration Act . . . with relation to importation for immoral purposes, where there can be no question with relation to the good faith of the parties. . . . The primary purpose of the act is to be protected against men and women who are weak, vicious and bad. *The question under this act is not whether Morel and the woman were legally married, but the purpose of bringing the common-law wife from Vancouver to Seattle.*”

Not only by their testimony but by their actions these parties proved that they believed they had a lawful right to sustain the relation of husband and wife.

The fact that the marriage in China between these parties was not performed in accordance with British law should not affect its legality.

In the note to the case of *Greenwood v. Frick*, 233 Fed. 629, 632, it is said:

"It seems well established that the presumption of the legality of a marriage and the legitimacy of children merges and destroys the presumption that a former spouse had continued alive; and that the second marriage was not ceremonial would not seem to affect the reason of the rule. (*Vreeland v. Vreeland*, 78 N. J. Eq. 256 and 34 L. R. A. [N. S.] 940.)"

It should be remembered that in our case neither the marriage between Lau Shee and Jew Shep nor the marriage between Lau Shee and her former husband was any more than a marriage by Chinese custom. The validity of the marriage in China of Lau Shee and Jew Shep is to be determined by the law of China.

Caine v. Johnson, 13 Fed. (2nd) 432;
Ex parte Suzanna, 295 Fed. 713.

Upon the question of whether or not a legal marriage existed, Lau Shee and her husband, Jew Shep, were examined. In addition, an attorney-at-law of this state, who knew the parties in China, testified that in his opinion the marriage ought to be recognized in the United States, and that a man and woman married in accordance with Chinese customs would be considered married in the State of California.

(See Seattle file 405/1-6 on the admission of Lau Shee at Seattle.)

Furthermore, the fact that the Board of Review found that the charge of practicing prostitution was not sus-

tained by any evidence, necessarily carries with it the concession that the conduct of the parties does not constitute the offense of "entering for an immoral purpose."

The Immigration Department, after a hearing, admitted Lau Shee as the wife of Jew Shep, and it is submitted that there is absolutely no evidence to show that the alien was not entitled to believe herself the lawful wife of Jew Shep.

Coming next to the finding by the Board of Review that the alien fraudulently entered the United States in that she was not the wife of Jew Shep at the time of entry: the obvious answer to such a contention is that a hearing and investigation was held at the time of Lau Shee's entry at Seattle. The immigration authorities were not bound to accept any of the statements made by the detained or her witnesses. There was ample time while the alien was held in custody to complete any investigation that they cared to make. The legal presumption, in the absence of any evidence to the contrary, must be that the immigration authorities properly performed the duties required of them in holding the hearing to determine Lau Shee's right to enter the United States as the wife of an American citizen. A full opportunity for inspection was afforded the Government. Lau Shee, during this inspection, made no attempt to conceal her identity, all of her names being given and the same family history related as previously testified to on her admission into the United States at the port of San Francisco (S. F. File 16210/210, September 13, 1917). This is admitted by the Government in the letter of District Director Bonham.

Having once determined that a marriage in fact was celebrated between Lau Shee and Jew Shep, the Gov-

ernment should have been bound by that determination.

The Board of Review seems to attach some significance to the fact that Lau Shee, on her first arrival in the United States, entered at the port of San Francisco, while on the occasion of her arrival in 1923 she entered at the port of Seattle. This fact, however, is entitled to no weight, for the reason that the alien and her husband repeatedly gave their ultimate destination as San Francisco. This is proven by their testimony in Seattle at the time of entry and also by the affidavit filed with the consular office in Hongkong prior to the departure for the United States.

We have already directed the court's attention to the testimony establishing the fact that a marriage was entered into in China between Lau Shee and Jew Shep. The validity of this marriage is to be determined by the laws of China. (See *Caine v. Johnson, supra*, and *Ex parte Suzanna, supra*.)

Section 63 of the Civil Code of the State of California provides that all marriages contracted without this state which would be valid by the laws of the country in which the same were contracted are valid in this state.

The Government seeks to attack the legal effect or validity of this marriage upon the ground that Lau Shee had previously been admitted to the United States as the wife of an American citizen, Yee Leung. It is our contention that once having established the fact of marriage between Lau Shee and Jew Shep, the burden was upon the Government to prove not only that a prior marriage had been contracted by Lau Shee, but that such prior marriage was still undissolved.

The law of California also includes the proposition that the state will recognize as valid all divorces granted

without the state which would be valid by the laws of the country in which the same are granted. The comity existing between countries necessitates that this be true.

No proof whatever was furnished by the Government to show that Lau Shee's prior marriage had not been dissolved either by a divorce from Lee Leung or by his death.

16 California Jurisprudence (page 935) states the rule of law here involved as follows:

"The burden lies upon the one who attacks the validity of a marriage upon the ground that it was contracted while a prior marriage was in force, to show not only that the prior marriage was contracted, but that it had not at the time of the second marriage been dissolved by death of a party or by a judicial decree. (Citing cases.)"

The Supreme Court of California said, in the case of *McKibbin v. McKibbin*, 139 Cal. 448:

"Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of the presumption, the truth of law and the fact that it is illegal and void."

Furthermore, the Government, once having admitted the fact of marriage, the Department of Labor should not be permitted to attack its validity. The validity of the marriage between Lau Shee and Jew Shep is a legal question and one that should be determined in a court of law. As pointed out, at best the Government only relies upon suspicion in attacking the marriage validity. Under such circumstances, where a child and family

rights are concerned, it would seem that an American citizen would be entitled to have the legality of his marriage passed upon by a court rather than to have such rights determined by an administrative official unskilled in the law.

For the sake of the argument, assume that the Government is correct in its contention that the marriage between Lau Shee and Jew Shep is void by reason of Lau Shee's previous marriage with Yee Leung. Yee Leung is an American citizen, and if Lau Shee is still his wife, then it must follow that she is entitled to remain in the United States under her previous status.

There can be no immorality in Lau Shee's previous conduct with Jew Shep, for the reason that Lau Shee lived with Jew Shep as his wife and bore a child to him under the bona fide belief that she was legally his wife. Her intent at the time of entry was to live with the man whom she believed to be her husband. Consequently there could be no intent to enter the United States for an immoral purpose.

Finally, upon this point, it should be observed that there is no distinction between an entry by false and misleading statements and a fraudulent entry. A fraudulent entry is embraced within an entry by false and misleading statements as a matter of law. Consequently, when the Board of Review found that too long a time had elapsed to deport the alien for an entry by means of false and misleading statements, it also should have found that the same reasoning applied to a fraudulent entry.

2. THE HEARING AFFORDED THE ALIEN LAU SHEE WAS
MANIFESTLY UNFAIR.

(1) Certain confidential reports were placed before W. W. Husband, Second Assistant Secretary of Labor, concerning Lau Shee and her husband, Jew Shep. These confidential reports were not made a part of the record herein, and consequently the alien and her attorney were denied the opportunity of examining the same and were unable to prepare any defense to refute the charges contained in the confidential reports. See letter April 17, 1926, from J. F. Dunton, Immigration Inspector at Seattle, to R. P. Bonham, District Director of Immigration at Portland, which reads as follows:

"I am returning herewith the copies of five documents which you sent me under personal cover with your letter of February 8, 1926, No. 5030/103, and which related to the Jew Shep matter. *The copy of your confidential report* to Mr. Husband is also enclosed. The other records forwarded with your letter of January 17, 1926, are being returned through official channels."

(This letter is to be found in the Seattle file of Lau Shee, No. 405/1-6.)

In the case of *Chew Hoy Quong v. White, Immigration Commissioner*, 249 Fed. 869, at 870, the Circuit Court of Appeals for the Ninth Circuit, speaking through Circuit Judge Gilbert, said:

"However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications the source, motive or contents of which are not disclosed

to the applicant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received."

See, also:

Lewis v. Johnson, 16 Fed. (2nd) 180.

As already pointed out, the matter contained in the confidential reports was placed before W. W. Husband, Second Assistant Secretary of Labor, and it is W. W. Husband, Second Assistant Secretary of Labor, who signed the opinion of the Board of Review which ordered Lau Shee deported to China, as well as the warrant of deportation. Such practice is manifestly unfair.

(2) The hearing was also manifestly unfair for the reason that the letter of District Director Bonham to the Commissioner of Immigration at San Francisco, and dated October 4, 1924, was introduced into evidence and made a part of the record over the alien's objection. We think that the Government will admit that the charges herein, as set forth in the warrant of arrest, were based on this letter. At least District Director Bonham, in a letter dated February 2, 1926, to the Commissioner of Immigration at San Francisco, states that he was responsible for the investigation and arrest of Lau Shee. In this letter of October 4, 1924, Bonham comes to the conclusion that the Lau Shee who entered at the port of Seattle in 1923 was the same Lau Shee who entered at the port of San Francisco in 1917; that she entered by means of false and misleading statements; that Lau Shee was not legally married; that she was brought to the United States for an immoral purpose; that he was *reliably informed* that she was a prostitute subsequent to her entry into the United States in 1917.

Although Mr. Bonham states that he was reliably informed that Lau Shee was a prostitute, an examination of the record will show that no testimony, documentary or otherwise, was introduced to substantiate this statement. In fact, Mr. Bonham failed to appear in person to testify in the matter at all. Under these circumstances this court can best judge whether or not Mr. Bonham had any information upon a charge that he makes so freely.

Counsel for the alien waived the right of cross-examination of this witness for the reason that the inspector conducting the hearing wanted to continue this case until such time as it would be convenient for Mr. Bonham to appear. This case has been pending two years in order to give Mr. Bonham an opportunity to develop his case and appear as a witness. The case was not summarily set down for hearing. The record will show that Mr. Bonham had sufficient notice of the time of the hearing to enable him to be present. It was unjust to the alien to insist that the complete hearing at the time set be conditioned on a waiver of the right of cross-examination of this witness.

It will be observed that only conclusions are stated in the letter. None of the ultimate facts or their source are stated. The alien was thus deprived of all opportunity to offer any testimony in rebuttal. The conclusion charging this alien with prostitution was enough to render the hearing manifestly unfair. A charge of prostitution is a serious matter at any time, but experience has proven that in immigration cases it is even more serious, and is tantamount to an order of deportation from the United States. The charge herein was made in 1924, the hearing on the charge was held in 1926, but

even with two years to investigate and prepare this case the Government could produce no evidence whatever of this alien having practiced prostitution. Under such circumstances the fair thing to have done would have been to dismiss the prostitution charge. However, this was not done.

(3) One of the material points in the case was whether or not the alien was free to enter into the marriage contract at the time she became the wife of Jew Shep in China. In this regard the alien testified that Yee Leung had deserted her about two years after she was landed in the United States, and had told her at that time that she was free to marry any one she wished; that she did not get a formal divorce in the United States because she was not married in accordance with the laws of this country. (See statement Lau Shee dated October 7, 1924, page 3.) It will be observed that there is no testimony in the record that Yee Leung did not obtain a divorce in the United States or in China.

Lau Shee, in the hearing afforded her under the warrant of arrest, requested that the immigration file of Yee Leung be made a part of the record herein. This record shows that on August 7, 1926, Yee Leung stated in his application for a form 430 to return to China that his second wife, Lau Shee, had left him three years before he departed for China in 1922. There then appear upon this request certain notations written in the handwriting of Immigration Inspector A. Kuchein, as follows:

"See statement made 3-16-22, when applying for a return certificate applicant was evasive in his answer regarding the whereabouts of his second wife and contradicted himself several times regarding the time she was last seen by him."

This statement, made on March 16, 1922, by Yee Leung concerning Lau Shee, would have been material in corroborating Lau Shee's testimony that she was free to marry at the time she married Jew Shep. However, we have searched the record in vain for any such statement. Such statement is as elusive as is the testimony of Mr. Bonham in substantiation of his prostitution charge. Inasmuch as the alien subsequently requested the complete file of Yee Leung with particular reference to his arrivals and departures in and from the United States and his examinations upon application for return certificates taken before the immigration officials since 1917, she was entitled to have this evidence before the Board of Review and before this court. It was manifestly unfair to deprive the alien of the benefit of this testimony.

(4) Finally, we contend that it was manifestly unfair to postpone the hearing herein for a period of two years and burden the alien's case with the insinuations and charges against her husband, Jew Shep. If this court will examine the immigration file of Jew Shep, who is admittedly an American citizen, it will be found that his file reeks with anonymous letters, newspaper clippings and letters between various offices of the Immigration Department. In one of these letters Mr. Bonham refers to Jew Shep as an "arch scoundrel."

All these papers were clearly inadmissible so far as the case of Lau Shee was concerned, and their introduction into the record in this case was most unfair.

It is evident from even a cursory examination of this case that the purpose of instigating the proceedings herein against Lau Shee was not because of any immorality on her part, but in the hope that Jew Shep could be charged with some offense. Lau Shee's case was post-

poned two years in anticipation that some tangible evidence could be produced against her husband.

The record shows that the Government expected to obtain some information in the hearing afforded Lau Shee to use against Shep.

A motive for this persecution of Shep is found in a telegram dated October 13, 1926, from William H. Wyle to the Honorable Carl Robe White, which reads in part as follows:

“This arrest (Lau Shee) following my refusal to wire your department (Labor) information given by me to you about conditions (immigration) Fresno was false.”

CONCLUSION

In conclusion, we respectfully contend that there is no legal testimony in this record which is sufficient as a matter of law to sustain the warrant of deportation of the alien Lau Shee. When the circumstances surrounding the charge herein and the manner of conducting the hearing are considered the result is manifestly unfair.

In the case of *Ex parte Rodriguez*, 15 Fed. (2nd) 878, it is said that a warrant of deportation is the exercise of executive authority, involving grave and momentous consequences, and to support the warrant there should be a definite and clear finding which would support the act.

Consider the consequences in the instant case: it involves the right of Jew Shep, admittedly an American citizen, to have the company of his wife; it involves the right of Jew Jin Ah, a boy only four years of age, to have the care and attention of his mother, and, finally, the deportation of Lau Shee at the present time prevents her from ever returning to the United States, for the

reason that the Chinese wife of an American citizen is no longer entitled to enter this country.

Wherefore, we respectfully request that the decision of the District Court for the Northern District of California be reversed, with instructions to issue the writ of habeas corpus as prayed for.

Respectfully submitted,

EMERY F. MITCHELL,
Attorney for Appellant.